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In The

Supreme Court of the United States

October Term, 1972

72-992

No. .....

EDWARD THOMAS MURRAY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on October 18, 1972.

CITATION TO OPINION BELOW

The decision of the trial court (TR Vol. II, pp. 382,383) is unreported and is printed in Appendix B hereto, *infra,* p. App. 1. The judgment of the Supreme Court of Virginia rendered without opinion, is unreported and is printed in Appendix B hereto, *infra,* p. App. 2.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on October 18, 1972 (Appendix B, *infra* p. App. 2). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether, in the light of the underlying principles evident in this Court's holding in *Jencks* v. *United States,* 353 U.S. 657 (1957), and the principles stated in *Brady* v. *Maryland,* 373 U.S. 83 (1963), the denial of defendant's motion for the production of prior statements of prosecution witnesses for use in cross-examination and for impeachment of those witnesses at trial is a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States set forth in full in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner was tried in the Corporation Court of the City of Norfolk, Virginia upon an indictment for murder in the first degree upon a plea of not guilty and requested a trial by jury (TR 4).

Petitioner is accused of the murder of one Laura Clemons who died of a single gunshot wound (TR 10; 40). A small, sharp steak knife (Commonwealth's Exhibit 10) was found by police officers at the right foot of the deceased (TR 40; Commonwealth's Exhibits 4 and 5; TR 41, 54). The knife and the floor near the knife had blood stains on them (Commonwealth's Exhibits 5 and 10; TR 60, 61, 234).

Petitioner claimed that he was being attacked by the deceased with the steak knife and that he shot her in self defense (TR 269-273; 333).

Witnesses for the Commonwealth denied seeing a knife in the hands of the deceased at any time (TR 99, 101; 140, 141). Of the four (4) eyewitnesses called by the Commonwealth, only two (2) were in a position to see whether the deceased had, and was attempting to use, a knife at the time of the shooting (TR 173, 174; 210, 211; 97, 98, 99; 120; 140). Both of these witnesses were questioned first by police officers shortly after the incident, and then again later. At the later questioning, their statements were taken down stenographically and recorded by police (TR 82-84; 123). During the cross-examination of these witnesses, Counsel for Petitioner called for the production of these statements so that they might be used in cross-examination of the witnesses. In both instances, the motion was denied by the Trial Court (TR 83, 84; 125; Appendix C, *infra,* p. App. 3).

At the close of the evidence, the case was submitted to the jury and the jury returned a verdict of guilty of murder in the second degree, fixing Petitioner's punishment at ten (10) years in the State penitentiary (TR 382). The Court promptly entered judgment on the verdict (TR 382, 383).

Petitioner filed a timely Notice of Appeal and Assignment of Error and petitioned the Supreme Court of Virgina for an Appeal and Supersedeas. By Order entered October 18, 1972, the Supreme Court of Virginia rejected the Petition and refused to grant an appeal, the effect of which was to affirm the judgment of the trial court (Appendix B, *infra,* p. App. 2).

The federal questions sought to be reviewed here were raised in the trial court by the oral motion of Counsel for Petitioner for the production of statements, given to police by two (2) eyewitnesses called by the Commonwealth, to

be used for cross-examination and impeachment (TR 82-84; 125). Defense counsel, citing the case of *Jencks* v. *United States,* 353 U.S. 657 (1957), argued that Petitioner had the right to view these statements under the rules stated in that case (TR 82-84, Appendix C, *infra,* p. App. 3). The motions were denied (TR 84; 125).

Petitioner's contention that he had the right to the production of the statements for use in cross-examination was presented to the Supreme Court of Virginia in his Notice of Appeal and Assignments of Error and his Petition for Appeal and Supersedeas. The Petition was refused (Appendix B, p. App. 2).

REASONS FOR GRANTING THE WRIT

The denial of the right of a defendant in a criminal case to the production and inspection of prior statements of prosecution witnesses to be used by the defendant for the purposes of cross-examination and impeachment of those witnesses is a denial of one of the basic elements of a fair trial, and, therefore, is a deprivation of liberty without the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has never decided the question of whether the due process clause of the Fourteenth Amendment requires the production of statements of prosecution witnesses for use by the defense in a criminal trial in a state court. In the case of *Jeneks* v. *United States,* 353 U.S. 657 (1957), involving a criminal trial in a federal court, the Court held that the defendant was entitled to have statements of government witnesses produced at the trial for inspection and use in cross-examination and for the impeachment of these witnesses. It was further held that it was error for a federal trial court to require that defendant be able to show some

inconsistency between the witness' statement and his testimony at trial before production would be required.

While it is generally recognized, and was acknowledged by this Court in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the decision in *Jencks* was not based on principles of constitutional law, but was founded in the Court's power to prescribe procedures for the administration of justice in the federal courts, members of the Court have recognized that constitutional principles lay just under the surface of that opinion. Thus, in *Palermo,* Mr. Justice Brennan, in a concurring opinion joined in by Chief Justice Earl Warren, Mr. Justice Black and Mr. Justice Douglas, stated:

> "It is true that our holding in *Jencks* was not put on constitutional grounds for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; . . ."

With this in mind, it becomes clear that the underlying principle of the *Jencks* opinion is one of fundamental fairness to the accused in a criminal trial ensuring that he will have ample opportunity to defend himself. This is just the kind of fundamental fairness required by the Fourteenth Amendment.

This underlying constitutional principle becomes more important when considered in the light of the recent developments in the area of the suppression of evidence by the prosecution in criminal trials. In *Brady* v. *Maryland,* 373 U.S. 83 (1963), this Court held that, in a state criminal prosecution, the suppression, by the prosecution, of evidence favorable to the accused violates due process. It was further held that such suppression is error regardless of the good or bad faith of the prosecution. Therefore, a criminal defendant now has a constitutional right to the production of

any material evidence in the hands of the prosecution which might be exculpatory to him.

If the *Brady* rule is to be fully effective, then provision must be made for defendant to have access to prosecution evidence material to his defense. The protection of a right guaranteed by the Constitution should not be left to the fortuitous chance that the accused may discover the existence of such evidence at some date after trial.

Certainly, statements previously given by prosecution witnesses covering the same events testified to at trial and indicating the guilt of the accused are material evidence. Just as certainly, such statements may contain materials favorable to the accused if made available to the defense. As was noted by the Court in *Jencks:*

> "Because only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must be initially entitled to see them (statements of witness) to determine what use may be made of them. Justice requires no less. . . ."

Due process, with its fundamental concept of providing a fair and impartial hearing for one accused of a crime requires that such a statement be made available to the defense. There can be no interest of the state, the protection of which is paramount in importance to such a basic right.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JERROLD G. WEINBERG
PETER W. SMITH, IV
Of Counsel

STACKHOUSE, WEINBERG & STEWART
1400 Virginia National Bank Building
Norfolk, Virginia 23510
Counsel for Petitioner

APPENDIX A

U.S.C., Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Judgment Of The Trial Court

In Open Court

The Court: Members of the jury, is this your verdict? We, the jury, find the defendant guilty of second degree murder, and fix his punishment at confinement of ten years in the penitentiary, signed by the foremen? Anything further of the jury? You may dismiss the jury, Mr. Sheriff.

(The jury left the courtroom at 5:50 P.M.)

The Clerk: Edward Thomas Murray, you have been convicted of murder in the second degree, and the jury has fixed your punishment at confinement in the penitentiary of this Commonwealth for the period of ten years. Is there anything for yourself you have or know to say why the Court should not here and now proceed to pronounce judgment against you, according to law?

Mr. Rowe: We move to set aside the verdict as contrary to the law and evidence, and we will have matters we would like to take up before the Court. I don't think it should be heard tonight.

The Court: I will pronounce sentence and grant the usual sixty-days stay. I fix the disposition at ten years for second degree, in accordance with the verdict, and I will grant the normal sixty-days stay of the execution of the sentence.

Judgment Of The Supreme Court Of Virginia

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 18th day of October, 1972.

The petition of Edward Thomas Murray for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 25th day of April, 1972, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy,
Teste:
Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

APPENDIX C

Motions For Production Of Statements And Rulings By Trial Court

In Open Court
(Transcript Pages 82 through 84)

By Mr. Weinberg:

Q. Have you spoken to any police officers about this case?

A. (Deloris Harris) The night of the incident, yes. That night.

Q. Did they take a written statement from you?

A. Yes, they did. No, not that night. We went downtown with the stenographer.

Q. Where did the police come with the stenographer? Where you live, or did you go to police headqurters?

A. I went to police headquarters.

Q. When was that done?

A. I believe it was the next day or the day after.

Q. Within the next two days, you went to police headquarters and gave a statement that was taken down by a stenographer?

A. Yes.

Q. Were you questioned in detail about this?

A. Yes.

Mr. Weinberg: Your Honor, we call for that statement, if we could. Under the Jenks rule, I think we are entitled to it before we cross examine further.

The Court: The Jenks rule, you say?

Mr. Weinberg: Yes.

The Court: I don't believe that applies here. She is here.

Mr. Weinberg: She has given a statement to the police, taken down by a stenographer. It is there in detail and I think we have a right to examine it, in order to determine if what she said today is consistent with what she originally told the police.

The Court: If you were going to do that type of probing, it would be done before the trial.

Mr. Rowe: Your Honor denied us those statements. We asked for it in a motion and you denied it.

The Court: That is true. I don't think the Jenks type situation applies here.

Mr. Weinberg: It is apparently reduced to writing, as far as I know. I haven't heard Mr. Christie deny it or say he doesn't have it. If it is not reduced to writing, I will sit down now, but assuming it is reduced to writing, I think we are entitled to examine it and see what inconsistencies may exist in what she testified to today and what she told the police in 48 hours after this occurred.

The Court: I don't think that situation applies.

Mr. Weinberg: Your Honor denies my motion?

The Court: Yes, sir.

Mr. Weinberg: We will respectfully save our exception.

* * *

(Transcript Page 125)

Mr. Weinberg: I'm sorry. Before I get to that, I would want to see that statement, and I presume your ruling would be the same.

The Court: Yes. Of course, as Mr. Rowe related, you did file the motion and the Court overruled it under the

rules—the new rules, as they are termed. In reference to your motion, per se, of course there was a Jenks case and there was Jenks legislation in respect to it. My understanding is that applies to notes and so forth of a government agent or witness, per se, not the witnesses in general. And I'm going to overrule your motion.

Mr. Weinberg: We save the point.

The Court: Yes.

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October Term, 1972

No. 72-992

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

QUESTION PRESENTED

Was the denial of defendant's motion for the production of prior written statements of prosecution witnesses, for use in cross-examination and for impeachment of those witnesses

at trial, a violation of defendant's constitutional rights to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

The "Statement of the Case" set out in defendant's brief is substantially correct, and is hereby adopted by the Commonwealth.

LAW AND ARGUMENT

Was The Denial Of Defendant's Motion For The Production Of Prior Written Statements Of Prosecution Witnesses, For Use In Cross-Examination And For Impeachment Of Those Witnesses At Trial, A Violation Of Defendant's Constitutional Rights To Due Process Guaranteed By The Fourteenth Amendment To The Constitution Of The United States?

The defendant asserts in his brief that this Court has never decided the question of whether the due process clause of the Fourteenth Amendment requires the production of statements of prosecution witnesses for use by the defense in a criminal trial in a state court, in line with the decision of *Jencks* v. *United States,* 353 U.S. 657 (1957). As pointed out in defendant's brief, it was stated by this Court in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the decision in *Jencks* was not based on principals of constitutional law, but was founded in the power of the Supreme Court to prescribe procedures for the administration of justice in the federal courts.

Following the decision of *Jencks,* Congress enacted the Jencks Act, 18 U.S.C. § 3500, which put into statute the effect of the *Jencks* decision. *Palermo* was decided subsequent to the Jencks Act and involved the construction of that Act. Contrary to the assertion in defendant's brief, this

Court has specifically stated that *Jencks* v. *United States, supra,* and the Jencks Act are not applicable to criminal trials in state courts. *United States* v. *Augenblick,* 383 U.S. 348 (1969). As stated in the opinion in *Augenblick,* the "*Jencks* decision and the Jencks Act were not cast in constitutional terms .... They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials." The Court admitted that there might be situations where denial of the production of a defendant's statement might be a denial of a Sixth Amendment right, but the facts in *Augenblick* did not make that case "a worthy candidate for consideration at the constitutional level."

The same can be said of the instant case where there is no evidence that the defendant was denied any information he did not already have which would be exculpatory to him, see *Brady* v. *Maryland,* 373 U.S. 83 (1963), and there is no evidence that he was denied compulsory process to obtain witnesses for his defense.

The ruling of the trial court in the instant case was based upon Rule 3A:14, of the Rules of Criminal Practice and Procedure, enacted by the Virginia Supreme Court to govern criminal trials in Virginia. Subsection (2) of said Rule reads as follows:

> "Upon written motion of an accused a court may order the Commonwealth's Attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the item sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Common-

wealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (2) of subparagraph (b)(1) of this Rule."

The exception referred to above in subparagraph (b) of Rule 3A:14 relates to the inspection of reports such as ballistic tests, fingerprint analyses, blood tests, and other scientific reports, etc.

The defendant has shown no valid reasons why Rule 3A:14, above, should be held unconstitutional in controlling the discovery and inspection of statements of the Commonwealth or in governing the conduct of criminal trials in Virginia. Defendant attempts to analogize his situation with *Brady* v. *Maryland, supra;* however, such an analogy is misplaced, inasmuch as *Brady* involved matters which were exculpatory to the defendant, not matters which might possibly be interesting to him or might possibly affect his cross-examination of a witness.

CONCLUSION

For the foregoing reasons, the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert W. Haith, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 6th day of April, 1973, I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Jerrold G. Weinberg, Esquire, and Peter W. Smith, IV, Esquire, Stackhouse, Weinberg & Stewart, 1400 Virginia National Bank Building, Norfolk, Virginia, 23510, counsel for petitioner.

GILBERT W. HAITH
Assistant Attorney General